IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NTP, INC.,	)
	)
Plaintiff,	)
	)
v.	) **Civil Action No. 3:07-CV-548-JRS**
	)
T-MOBILE USA, INC.	)
	)
Defendant.	)

MEMORANDUM IN SUPPORT OF T-MOBILE'S MOTION TO STAY

Defendant T-Mobile USA, Inc. ("T-Mobile"), by counsel, states as follows in support of its motion to stay this action pending the conclusion of all proceedings, including all appeals, arising out of the United States Patent and Trademark Office's reexamination of the patents asserted against T-Mobile by Plaintiff NTP, Inc. ("NTP") in this case.

The United States Patent and Trademark Office ("PTO") has issued final rejections over each and every claim of each of the patents NTP asserts in this case.[1] Because of these pending reexaminations, this Court has already stayed proceedings in another action in which NTP attempted to assert seven of these patents against Palm, Inc. ("Palm"). (See Ex. 1 attached hereto, Stay Order in *NTP, Inc. v. Palm, Inc.*, Civil Action No 3:06-CV-836-JRS.) Further, in another action in this Court in which NTP asserts these same patents against Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), Verizon has moved to stay for the same reasons underlying the Court's stay order in *Palm*; Verizon's motion is now fully briefed and pending before the Court. (See Exs. 2-4 attached hereto, Briefing on Motion to Stay from *NTP, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, Civil Action No. 3:07-CV-549-JRS.)

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[1] The patents-in-suit include U.S. Patent No. 5,436,960 ("the '960 patent"); U.S. Patent No. 5,438,611 ("the '611 patent"); U.S. Patent No. 5,625,670 ("the '670 patent"); U.S. Patent No. 5,819,172 ("the '172 patent"); U.S. Patent No. 6,067,451 ("the '451 patent"); U.S. Patent No. 6,317,592 ("the '592 patent"); U.S. Patent No. 5,479,472 ("the '472 patent"); and U.S. Patent No. 5,631,946 ("the '946 patent") (collectively, the "patents-in-suit").

Herein, T-Mobile respectfully requests the same relief granted to Palm, and the same relief sought by Verizon Wireless in its action. Entering T-Mobile's proposed stay will conserve the time and resources of the Court as well as the parties. As this Court recognized in granting the stay in the *Palm* proceeding, the reexamination records will simplify the issues, and "[t]here is simply no reason to justify the maintenance and expense of the action during the pendency of an examination whose resolution could summarily resolve these matters." (Ex. 1 at 6.) For all of these reasons, T-Mobile respectfully requests the Court to stay this action according to the language of the Proposed Stay Order, filed herewith.

ARGUMENT

I. The Court's Analysis Staying The *Palm* Litigation Applies Equally In The Instant Case.

A stay is equally appropriate in the instant case as in *Palm*, and T-Mobile should receive the benefit of a stay. T-Mobile brings this motion before any discovery or filing of substantive pleadings, and no trial date has been set. The final results of the reexaminations of NTP's patents will simplify the litigation through cancellation, clarification, or limitation of claims. *See Tap Pharm. Prods., Inc. v. Atrix Labs., Inc.* 70 U.S.P.Q.2d 1319, 1320 (N.D. Ill. 2004); *Target Therapeutics, Inc. v. Scimed Life Sys., Inc.*, 33 U.S.P.Q. 2d 2022, 2023 (N.D. Cal. 1995).

In addition to the Court's well-reasoned decision in *Palm*, T-Mobile also respectfully refers the Court to the reasoning in favor of a stay set forth in Verizon Wireless' arguments in its Memorandum in Support of its Motion to Stay. (See Ex. 2 (Verizon Wireless' Motion to Stay, and Memorandum in Support).) Specifically, therein, Verizon Wireless discusses in detail the current status of the reexamination proceedings (final rejection of all claims), the benefit of such proceedings in narrowing the claims of the asserted patents even if not ultimately rejected on appeal, the interests of comity weighing in favor of a stay, conservation of judicial resources resulting from a stay, and lack of prejudice to NTP if a stay were granted and contrasting prejudice to the defendant if a stay were denied. (See Ex. 2 at 8-13.)

II. The Court Should Grant The Stay Without Requiring T-Mobile To Be Bound By The Results Of Reexamination Proceedings.

T-Mobile requests that the Court enter a stay in the form of the Proposed Order attached hereto, which is consistent with the stay entered in *Palm*. Any such stay should not be conditioned on T-Mobile being bound by the outcome of the reexamination proceedings, as NTP proposes in its *Verizon Wireless* briefing.[2]

In these circumstances, equity favors a stay regardless of any agreement by the moving party to be bound by the PTO's determination of patentability. "[O]n the one hand, if the patents are declared unpatentable, this action would be moot. On the other hand, even though [the moving party has] not agreed to be bound by a PTO finding of a valid patent, such a finding would be admissible and carries a presumption of validity." *GPAC, Inc. v. D.W.W. Enterprises, Inc.*, 23 U.S.P.Q.2d 1129, 1133-1134 (D.N.J. 1992) (citing *Grayling Industries, Inc. v. GPAC, Inc.*, 19 U.S.P.Q.2d 1872, 1874 (N.D. Ga. 1991)). Indeed, "the efficiency of a final PTO determination outweighs any added expense arising from a stay of litigation even without an agreement to by bound by the PTO." *Id.*

In proposing that the Court order such conditions on a stay in the *Verizon Wireless* litigation, NTP relies on two cases from the Eastern District of Texas in which at least one defendant therein was party to the reexamination proceedings before the PTO. (See Ex. 3 at pp. 3-4.) Such is not the case here, and no such conditions are warranted. For further discussion of why these conditions are inappropriate, T-Mobile respectfully refers the Court to Verizon Wireless' Reply, attached hereto as Exhibit 4. (See Ex. 4 (Verizon Wireless' Reply Memorandum in Support of its Motion to Stay) at p. 3 and n. 1.)

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[2] In its September 20, 2007 Response to Verizon Wireless' Motion to Stay, NTP proposed conditions of the stay, including binding Verizon Wireless to the "final decision with respect to the Reexamination Proceedings on the patentability of any of the claims of the patents listed above with respect to any prior art allegation based on any prior art submitted to the Patent Office." (Ex. 3 (NTP's Response to Verizon Wireless' Motion to Stay) at p. 2.)

CONCLUSION

For the foregoing reasons, T-Mobile respectfully requests that the Court enter the Order attached hereto and grant its motion to stay this litigation pending resolution of the patent reexamination proceedings, including all appeals therefrom.

Respectfully submitted,

T-MOBILE USA, INC.

By: ____________/s/____________________
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2007, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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